Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities	)	GN Docket No. 00-185
	)	
Internet Over Cable Declaratory Ruling	)	
	)	
Appropriate Regulatory Treatment for Broadband Access To the Internet Over Cable Facilities	)	CS Docket No. 02-52

REPLY COMMENTS OF AT&T CORP.

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Pursuant to the Commission's *Notice*, AT&T Corp. ("AT&T") respectfully submits its reply comments in this proceeding.

SUMMARY AND INTRODUCTION

In recent years, cable operators nationwide have made massive and risky investments to upgrade their networks to offer a wide range of services to the public, including cable modem service. As a direct result of these efforts, cable modem service is now available to approximately three quarters of American households.[1] Facing stiff competition from direct broadcast satellite service ("DBS") and other distributors of video programming and from both narrowband and broadband Internet access providers and needing to generate revenue as quickly as possible to offset the cost of the network upgrades, cable operators are acting on their unalloyed incentives to maximize the value of their cable modem services. The record in this

[1] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling & Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, ¶ 1 (2002) ("*Declaratory Ruling*" or "*Notice*"); *Third Report in the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 17 FCC Rcd. 2844, ¶ 65 (2002) ("*Third Section 706 Report*").

proceeding demonstrates that cable operators, responding to market forces, have made sustained efforts to resolve the substantial technical and operational problems associated with multiple Internet service provider ("ISP") access, and that efforts to offer cable modem service customers a choice of ISP providers are only accelerating.

These market developments vindicate the Commission's policy of "vigilant restraint" from regulation of Internet access over cable networks, and no commenters give the Commission reason to depart from that policy. The few proponents of forced access either offer no analysis or simply posit conjectural possibilities that cable operators *could* take anticompetitive actions or restrict consumer access to the Internet in the future. They do not offer any evidence of such acts or even any analysis as to why, in light of consumer preferences and market pressures, cable operators could or would do so. None offers the Commission a coherent model of forced access regulation short of full common carrier regulation, confronts the technical and operational difficulties of multiple ISP access over cable networks, or weighs the high costs of regulation against the purported benefits of forced access. In short, no colorable case for forced access is made, and certainly none sufficient to meet the high standards for the Commission's exercise of Title I authority or for permissible restrictions on a cable operator's editorial discretion under the First Amendment. Unlike the wireline environment, where the Bell Operating Companies ("Bells") have affirmatively sought to exclude ISP access to protect profitable second-line and ISDN/T1 services, and where access regulations are well established, there is no basis for Commission intervention in this rapidly changing market.

Freedom from state and local regulation of cable modem service is every bit as critical as freedom from unwarranted federal regulation. In Title VI of the Communications Act, Congress has expressly limited the power of states and localities to regulate information services offered by cable operators, and the Commission should reject the arguments of local interests that they have untrammeled authority to regulate and impose fees upon cable modem service outside of the strictures of Title VI. Title VI governs all franchises for the operation of cable systems. No locality may require franchises outside of Title VI or impose fees beyond the franchise fee cap of section 622, and no local franchising authority ("LFA") may regulate services provided over a cable system except as Congress has permitted, a prohibition that extends to forced access regimes.

None of these restrictions intrudes upon state sovereignty or effects a taking of property, as the localities claim. Congress has undoubted power to protect interstate commerce from local overreaching and excessive fee exactions. Moreover, localities are not "uncompensated" for the use of the public right of way ("ROW") if franchise fees are capped at 5% of cable service revenues. The use of the ROW in question is the installation of a cable system in that ROW, not the transmission of particular electrons over the network, and the localities cannot demonstrate that the franchise fees authorized under Title VI are constitutionally inadequate compensation for that use. Nor is it true that cable modem service imposes special additional burdens on the ROW. The burdens the localities identify are all associated with recent network upgrades, which have multiple purposes beyond enabling the provision of cable modem service, and would be necessary for the provision of advanced video services (for which the localities directly receive compensation).

As to other issues raised in this proceeding, the Commission should declare that cable operators do not violate Title VI in passing through to subscribers franchise fees that were actually paid in good faith, even if it is later determined that the franchise fee imposed by the LFA was excessive. The Commission should also reject the Department of Justice's and FBI's claim that cable operators providing cable modem service are subject to the Communications Assistance for Law Enforcement Act ("CALEA"). CALEA by its terms applies only to telecommunications common carriers, and information services are specifically exempted from its reach. Law enforcement has ample authority under other federal statutes to conduct legitimate surveillance activities in regard to cable modem service.

The Commission should reject the proposal that it exercise Title I authority to extend disability access rights under section 255 of the Act to cable modem services. Section 255 of the Act applies only to telecommunications services, and the Commission has already determined that it will invoke its Title I authority only with regard to those few information services (such as voice mail and interactive menu services) that are essential to the use of telecommunications services. Internet access service does not fit that category. Moreover, there is no force to the argument that such action is necessary to ensure that persons with disabilities have unfettered access to ISPs and other content providers with unique services. Click-through access to all such providers is already available with cable modem service. Finally, the Commission should grant forbearance from any telecommunications regulation in the Ninth Circuit, based on that court's erroneous determination prior to the Commission's ruling that cable modem service included a "telecommunications service." Although the Ninth Circuit may correct its error in light of the Commission's ruling, it is procompetitive and proconsumer for the Commission to ensure a uniform national policy regarding information services, and each of the statutory requirements for forbearance is satisfied.

ARGUMENT

I. FORCED ACCESS REGULATION OF CABLE MODEM SERVICE IS UNNECESSARY AND UNLAWFUL.

The comments confirm that the Commission should once again decline to impose forced ISP access regulation on cable operators. Investment in network upgrades has been robust, cable modem service subscribership is on the rise, and cable operators are rapidly developing commercially practicable arrangements for multiple ISP access.[2] Additional ISP choices can make cable modem service (and cable operators' video and other services as well) more attractive, and that provides cable operators with powerful incentives to implement cost effective, customer-friendly multiple ISP solutions to draw customers away from cost-competitive dial-up and DSL services that already offer ISP choice. Unlike incumbent local exchange carriers, cable operators do not offer narrowband services and, for that reason, have no countervailing incentives to protect lucrative second-line and ISDN/T1 sales.[3] And the record in this proceeding confirms that in the past months, as prior exclusive ISP provider contracts expired, cable operators have acted on their clear incentives to facilitate choice, despite daunting technical and operational hurdles. On this record, there is no nonarbitrary policy justification for regulatory intervention.[4]

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[2] *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd. 1244 ¶ 33 (2002) ("Eighth Annual Video Programming Report"); AT&T Comments 13-16.

[3] *Id.* at 3, 12-13.

[4] *See, e.g.,* American Cable Association at 4-11; AOL-Time Warner, at 17-25; Arizona Cable Telecommunications Association at 8-12; Bruce M. Owen on behalf of National Cable & Telecommunications Association at 8-14; Cablevision Systems Corp. at 6-9; Charter Communications, Inc. at 2-14; Comcast Corp. at 5-25; Cox Communications, Inc. at 15-23; High Tech Broadband Coalition at 3-6; Motorola at 1-8; National Cable & Telecommunications Association at 13-33.

Because there is no evidence of market dysfunction, there is also no factual predicate to justify any exercise of Title I authority because access regulation is not "imperative" in order to allow the Commission "to perform with appropriate effectiveness" its other responsibilities under the Communications Act.[5] Nor could forced access survive intermediate First Amendment scrutiny, because there is no "substantial evidence" that the harms it seeks to prevent or redress "are real, not conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[6]

The handful of commenters that support cable forced access regulation fail to demonstrate any legitimate Title I justification for such regulation, much less one that could survive intermediate First Amendment scrutiny. Most simply assume Commission authority,[7] and urge the Commission to exercise that authority on the basis of unfounded speculation that ignores market realities.

Earthlink, for example, argues that because cable modem service is provided via telecommunications, the Commission may rely upon its authority to regulate "communication by wire" under Section 3(52) of the Act.[8] ASCENT argues that Section 4(i) of the Act gives the

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[5] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 173 (1968); AT&T Comments at 18-20.

[6] *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 664, 666 (1994) (*Turner I*).

[7] *See* Attorney General of the State of Texas at 4-5; State of California at 4-6; The Consumer Federation of America at 22-39; Amazon at 8-9; ACLU at 2-3. At least one commentator supporting forced access acknowledges that the Commission "lacks a clear legal basis to require non-discriminatory interconnection and carriage." *See* Consumer Federation of America at 41.

[8] Earthlink at 13. In addition, Earthlink and others continue to voice disagreement with the Commission's determination that cable modem service "is an interstate information service, and that there is no separate telecommunications service offering to subscribers or ISPs," *Declaratory Ruling* ¶ 33. *See, e.g.,* Association of Communications Enterprises ("ASCENT") at 2-9; Attorney General of the State of Texas at 2-3; Earthlink at 3; Consumer Federation of America at 3-11. Those arguments are procedurally improper. The Commission has issued a (continued . . .)

Commission the needed authority. These commenters confuse the statutory source of the Commission's Title I ancillary jurisdiction with the standards for the exercise of that jurisdiction. As AT&T explained in its opening comments, the Commission may only exercise its ancillary jurisdiction under Title I when doing so is "imperative" to allow the Commission "to perform with appropriate effectiveness" its other responsibilities under the Communications Act.[9] Given that cable operators are moving expeditiously to develop multiple ISP access arrangements, and that centralized regulation would be costly and counterproductive, there is no serious argument that cable forced access regulation is imperative to the effective performance of the Commission's statutory responsibilities.[10]

Earthlink and others contend that recent cable modem service price increases and the national "market" share of cable modem service prove that cable operators have market power that they will use to exclude unaffiliated ISPs. Even apart from the obvious flaws in these commenters' superficial analyses of market definitions and market power, the short answer is that this theory has already been disproved in the marketplace: cable operators are, in fact, embracing ISP choice notwithstanding a market share advantage over DSL in some local markets (an advantage which is itself largely a relic of incumbent local exchange carriers' well

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(. . . continued)
final ruling (not a tentative one) on the proper statutory classification, and that ruling is now on appeal. *See National League of Cities v. FCC*, Case No. 02-71425 (9th Cir., filed May 24, 2002).

[9] AT&T at 19 (citing *United States v. Southwestern Cable*, 392 U.S. 157, 173 (1968); *id.* at 178 (Commission's Title I authority extends only to matters "reasonably ancillary to the effective performance of the Commission's various responsibilities"); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 697 (1979); *see also National Association of Regulatory Utility Commissioners* v. *FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976) (*NARUC II*) (the Commission must demonstrate that its proposed Title I regulation "is really incidental to, and contingent upon, specifically delegated powers under the Act," such as Title II or III powers); *Midland Telecasting Co.* v. *Midessa Television Co.*, 617 F.2d 1141, 1148 n.9 (5th Cir. 1980).

[10] AT&T Comments at 18-20.

recognized reluctance to deploy DSL services that compete with their narrowband and other offerings).[11] The recent changes to the prices of AT&T Broadband's cable modem services (which came after substantial price increases by all of the major DSL providers) cannot remotely be characterized as an exercise of market power: the monthly service fee increase was offset by an equivalent decrease in the cable modem lease price, meaning that the total monthly bill did not change for ninety percent of AT&T customers.[12] Given that cable companies (unlike the major DSL providers) have no monopoly services to protect, existing competition (from broadband and narrowband competitors) provides cable operators ample incentives to negotiate fairly with ISPs – as the overwhelming marketplace evidence confirms.

As even Earthlink recognizes, cable operators benefit from increased revenues and wider marketing efforts when they provide customers with multiple-ISP access.[13] Thus, ISPs, particularly those like EarthLink, AOL and others for which there are strong consumer demand, have substantial bargaining power in carriage negotiations.

Although it acknowledges that many cable operators, including AT&T, have already opened their networks to unaffiliated ISPs, Earthlink claims that these arrangements "fall far short of ensuring widespread availability of multiple broadband ISPs to consumers."[14]

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[11] It is by no means true that cable modem service leads DSL in market share in all markets. For example, "DSL service offered by the incumbent telephone companies is the predominant method of broadband access to the Internet for the majority of residential customers in California." State of California at 4.

[12] The total cost will eventually increase for the small percentage of customers who own their cable modem, but AT&T has provided those customers with six months of coupons to offset the increase. In any event, cable modem service is still generally cheaper than DSL.

[13] Earthlink at 7.

[14] *Id*. at 8.

Earthlink speculates that cable operators have not entered into these arrangements voluntarily, but have done so only as a result of governmental pressure.[15]

In fact, cable operators have moved with remarkable speed to provide their customers with a choice of ISPs despite the enormous technical difficulties and costs involved. Earthlink has been a prime beneficiary of these efforts. Currently, Earthlink is being offered over the AOL Time Warner cable network in almost forty markets and has commenced service over the AT&T cable network in Seattle (with Boston soon to come).[16] In addition, AT&T has also entered into agreements with two regional ISPs.[17] Comcast also recently reached an agreement to provide customers in Indianapolis and Nashville with access to United Online's ISP services and is conducting a technical trial over its Longport, New Jersey cable system with Earthlink.[18] And AOL Time Warner is currently offering customers in nearly all of its divisions a choice of at least three national ISPs and has reached agreements with another 14 ISPs.[19]

It is highly misleading to suggest that cable operators have only invested in multiple-ISP access as a result of governmental pressure. Although the Federal Trade Commission conditioned approval of the AOL-Time Warner merger on a guarantee of multiple-ISP access, the two companies were moving in that direction even before the conditions were imposed.[20] AT&T has been implementing multiple-ISP access without prompting from

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[15] *Id*.

[16] *Earthlink and AT&T launch ISP Choice In Seattle* (July 15, 2002) *available at* http://money.cnn.com/services/tickerheadlines/prn/en-lam058.P1.07152002012451.17148.htm; Earthlink at 8.

[17] *See* AT&T at 14-15.

[18] *See* Comcast at 11.

[19] *See* AOL Time Warner at 23-24.

[20] *See* AOL Time Warner at 19.

regulators. The Commission specifically declined to impose forced access as a condition of AT&T's merger with MediaOne,[21] yet AT&T continued to conduct costly trials and invest resources to provide customers with a choice of ISPs.[22]

It is also misleading to suggest, as some commenters have, that cable operators have imposed unreasonable restrictions on their subscribers' use of devices and access to applications and sites.[23] The majority of the "restrictions" cited by the High Tech Broadband Coalition merely reflect legitimate efforts by cable operators to ensure that residential customers do not use their subscriptions to operate an ISP or otherwise run a commercial enterprise. The reason is simple: The service these consumers pay for is engineered and priced for residential use, and running a business would hog bandwidth and could negatively affect other subscribers' ability to access the Internet. The other restrictions the Coalition cites simply give cable operators the right to manage their networks (*e.g.*, in order to offer IP telephony of acceptable quality, an operator might find it necessary to give priority to voice packets), or require customers who want to obtain services or content not included in their subscription to pay for those additional services (e.g., a cable operator might provide alarm monitoring or access to on-line gaming services for an additional fee).

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[21] *See Mem. Opinion & Order, In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd. 9816, ¶ 117 (2000) ("AT&T/MediaOne Order").

[22] Earthlink also absurdly suggests that cable operators contributed to the bankruptcy of Excite@Home and other affiliated ISPs by insisting on unreasonable terms. *See* Earthlink at 9. AT&T was the largest shareholder in Excite@Home and lost billions of dollars as a result of its demise. The bankruptcy also interrupted AT&T's HSD service and created significant operational difficulties.

[23] *See* High-Tech Broadband Coalition at 10-13.

In spite of the evidence of a broad market shift to multiple ISP access, some commenters insist that forced access is necessary to preserve the dynamic, open culture of the Internet and the role of ISPs in spurring competition and innovation.[24] Without a requirement that cable operators provide nondiscriminatory access to all ISPs, they argue, the Internet will be controlled by a few networks with an incentive to stifle content and innovation that does not benefit them. But these commenters offer no evidence to support their assertions, and, again, the marketplace realities refute them. Cable operators have been providing broadband services for several years, and there is no evidence that they ever have attempted to block content or deny click-through access to any content provider.[25] That is unsurprising. As Professors Ordover and Willig explained in the AT&T/MediaOne merger proceeding:

> AT&T cannot afford to deny its customers access to content by imposing proprietary standards or otherwise refusing to carry content. Having only a fraction of the market, but having spent billions of dollars of shareholder resources to purchase TCI and MediaOne, AT&T needs to attract customers away from the industry leaders in order to make its investments pay off. And, establishing proprietary standards that limit the content available to its customers is likely the surest way to discourage customers from making the switch.[26]

Nor is it true that forced access is necessary to preserve the role of ISPs on the Internet. As explained above, many ISPs are currently entering into contracts to provide Internet access over cable networks. In addition, click-through access ensures that even those ISPs that do not enter into agreements with cable operators will still be available to consumers. The Consumer Federation of America argues that click-through access is insufficient because it does not allow ISPs to compete for consumer dollars until after the cable operators have charged a fee

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[24] *See* The Consumer Federation of America at 22-32.

[25] *See Declaratory Ruling* ¶ 87.

[26] Declaration of Janusz A. Ordover and Robert D. Willig, CS Docket No. 99-251, at ¶ 129 (attached to Reply Comments of AT&T, filed September 17, 1999).

for Internet access. Of course, an ISP that offers content, features or services that consumers value will be able to charge consumers (and, for the same reason, could likely negotiate a mutually beneficial carriage deal with cable operators).[27] In any event, competing for the dollars that consumers spend on Internet access is only one of the many business models available to ISPs. There are many other revenue sources, including advertising, that ISPs can target to cover costs.

What is clear, however, is that forced access would require a costly, elaborate regulatory regime that would mire the Commission in the most minor disputes between cable operators and ISPs. As the comments of the Consumer Federation make clear, imposing a forced access requirement would only be the first step.[28] The Commission would then have to monitor every aspect of the relationship between cable operators and ISPs, including pricing, costs, interconnection, billing, communication with customers, and the meaning of "non-discriminatory access." Common carrier regulation of telephone networks that were designed to operate under such a legal regime can be accommodated at relatively low cost – and, unlike cable, common carrier regulation of incumbent LEC services is necessary to protect consumers and competition from the exercise of market power – but grafting unnecessary common carrier regulation onto cable networks and services could not serve the public interest. The Commission has wisely followed a policy of "vigilant restraint" with regard to cable modem services, and there is no reason to change course now.

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[27] *See, e.g.,* Saul Hansell, *Can AOL Keep its Subscribers in a New World of Broadband,* New York Times, July 29, 2002 at C1 ("[M]any of the America Online members who do switch to broadband from other providers keep their America Online memberships in addition to their broadband service. AOL markets a $15-a-month bring-your own-access plan, specifically designed for people with broadband connections who want to keep using the AOL software and e-mail.").

II. REGULATORY PARITY DOES NOT DEMAND (OR ALLOW) IDENTICAL TREATMENT OF CABLE MODEM AND WIRELINE BROADBAND SERVICES.

BellSouth and a few other commenters urge the Commission to impose the exact same regulatory scheme on cable and wireline Internet access services.[29] Although BellSouth agrees with the Commission's ruling that cable modem service is an information service and therefore not subject to Title II's common carrier obligations, it argues that if the Title II restrictions currently placed on the provision of broadband services by incumbent LECs are not lifted, the Commission should impose forced access on cable modem service. *See* BellSouth at 2, 8-9.

The Commission has made clear that what regulatory parity demands is "an analytical approach that is, to the extent possible, consistent across multiple platforms."[30] Moreover, the Commission has recognized that "legal, market, or technological distinctions may *require* different regulatory requirements between platforms."[31] BellSouth attempts to gloss over the differences between wireline broadband and cable modem service, focusing instead on surface similarities. But as AT&T made clear in its opening comments, there are key market, technological and legal distinctions between cable and local telephone networks and services that require different regulation.[32]

(. . . continued)

[28] *See* Consumer Federation of America at 40-49.

[29] The Attorney General for the State of Texas and USTA refer in passing to regulatory parity in their comments, but neither provides any analysis to support the position. *See* State of Texas at 3-4; USTA at 5.

[30] *Declaratory Ruling* ¶ 73.

[31] *LEC Wireline NPRM* ¶ 7 (emphasis added).

[32] *See* AT&T at 23-30.

More specifically, BellSouth contends that there is no "rational, market-based justification" for the imposition of *Computer II/III* on wireline providers and not cable operators because cable modem services have a larger share of the national "residential broadband market."[33] But there is no such market. Even ignoring the clear competitive constraining effects of narrowband services from which cable operators must attract customers, Internet access markets are local.

BellSouth's argument also disregards the profound market distinctions between the cable and wireline broadband services. It is not (as Bell South contends) "historically irrelevant factors," but current market power and incentives that require distinctive regulatory treatment of cable and wireline providers. As described in AT&T's initial comments, the critical point is that incumbent LECs, unlike cable operators, have both the incentive and power to exclude ISPs from access to broadband services and to limit consumer choice. The Bells have incentives to protect the hefty returns on legacy services – such as second and T1 lines – for which broadband services substitute. Indeed, BellSouth acknowledged as much in a recent filing before the Commission, stating that

> *advanced services are increasingly likely to cannibalize the traditional services offered by ILECs*. For example, the advent of digital subscriber line ("DSL") technology has applied the brakes on ILECs' "second line" service, and dedicated high-speed connections to packet networks are steadily replacing modem-based connections to circuit-switched networks, while delivering services of equal or better quality to customers. In this environment, ILECs have to carefully fine tune the sequence in which they introduce their new services, and the timing with which they do so.[34]

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[33] BellSouth at 5.

[34] Reply Declaration by NERA on Behalf of BellSouth Corp., CC Docket No. 01-338 (filed July 17, 2002) at 108 (emphasis added).

It is precisely for these reasons that the Bells have withdrawn standalone DSL-based services that would permit customers to buy DSL transport and then select from one of several independent ISPs, offering instead their integrated DSL-based Internet access services.[35] Similarly, the record in the *Wireline Broadband* proceeding demonstrates that the Bells have largely driven their DSL transport competitors out of business, and that the Bells' own wholesale DSL offerings are designed to prevent competition from unaffiliated ISPs rather than maximize demand for broadband facilities.[36]

In stark contrast, cable companies have no legacy data line revenues to protect. Thus, increased cable modem service sales mean a greater return on the enormous fixed investments cable companies made to upgrade their networks.[37] These market differences explain why "[c]able operators have been the leaders in deploying broadband networks and have moved forward in opening up their systems to multiple ISPs."[38]

BellSouth' rigid view of regulatory parity is also foreclosed by technical and legal differences between cable companies and the Bells. The Bells' networks were designed for and have always been operated for point-to-point common carrier communications, and the Bells have for decades been required to provide equal and nondiscriminatory access to all consumers, interexchange carriers and ISPs. Indeed, even the DSL technology itself is mature and developed in a multiple-ISP environment. DSL-based services are not materially different from older "pair gain" technologies and have long been provided on a common carrier basis over the

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[35] AT&T Wireline Broadband Comments at 77; Willig Wireline Broadband Dec. ¶ 105.

[36] AT&T Wireline Broadband Comments at 42-46, 49; Willig Wireline Broadband Dec. ¶¶ 49-50.

[37] *See* Willig Wireline Broadband Dec. ¶¶ 102-04.

[38] *Id*. ¶ 104.

very same wires as voice and other traditional common carrier services.[39] In contrast, as explained in AT&T's initial comments, there are no established systems, processes or rules that could support forced access regulation of cable. For these reasons, regulatory measures appropriate for a mature common-carriage technology like DSL cannot be considered appropriate in the cable environment where solutions to the complex problems of multiple-ISP access are still being worked out.

And with regard to legal differences, Congress properly required incumbent LECs to unbundle their local networks to new entrant competitors in order to foster competition in monopolized local exchange markets.[40] By definition, absent access to broadband capable loops, competitive LECs will be foreclosed altogether from competing for the increasing number of customers that want voice and data services over a single line. In contrast, cable operators face vigorous competition in all of the businesses in which they compete, including their provision of core video programming services.[41] Indeed, because of the fundamental differences between incumbent LECs and cable operators, Congress specifically considered and rejected a "regulatory parity" proposal prior to the enactment of the 1996 Act.[42] Thus, it would be

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[39] *See* Declaration of Richard A. Chandler, CC Docket No. 02-33, at ¶¶ 24-36 (attached to Comments of AT&T, filed May 3, 2002) ("Chandler Wireline Broadband Dec.").

[40] *See* 47 U.S.C. § 251(c).

[41] AT&T Triennial UNE Review Comments, CC Docket No. 01-338, at 99-100 (filed July 17, 2002).

[42] *See, e.g.*, *Stevens Draft Includes 'Title VII' Provision; Senator Hopes to Include Language in Other Bills*, Telecommunications Report, Apr. 18, 1994, at 1-2; *White House Working to Include 'Title VII' in Telecom Bills; Hollings Says Provision 'Isn't Realistic At This Time*, Telecommunications Report, Feb. 28, 1994, at 4-6. Under one version of this proposed framework, all providers of "advanced" services would have been subject to similar access and interconnection obligations. *See NARUC Adopts Package of Legislative Resolutions to Guide Negotiations on Fast-Moving Telecom Bills*, Telecommunications Report, Mar. 7, 1994, at 10-15 (describing specifics of proposed Title VII and NARUC's opposition thereto).

impermissible for the Commission to subject cable companies to Title II-type regulation when Congress specifically rejected imposing unbundling obligations on cable companies.

Finally, and in all events, BellSouth is unable to establish the necessary factual predicate for its claim – that the Bells are "hamstrung by regulation that hinders their ability to compete and restrains ILEC broadband deployment" while the cable companies are largely free from regulation.[43] In reality, once the Bells began to deploy DSL technology – rather than let it continue gathering dust – they have enjoyed enormous success and can now offer DSL service to the majority of their subscribers.[44] Indeed, according to the most recent Commission data, DSL grew by 95% last year – faster than cable modem service.[45] On the other hand, cable operators are not "unregulated," as BellSouth claims, but bear substantial regulatory costs specific to cable systems that the Bells do not bear.[46] Cable companies must comply with local franchising requirements and pay billions of dollars in annual franchise fees.[47] They must build and *donate* "institutional networks" to franchising authorities. They are subject to "must-carry," PEG, and other regulations that require them to share their networks – and, unlike the ILECs' network sharing obligations, these cable sharing obligations are uncompensated. *See* 47 U.S.C. §§ 531-

[43] BellSouth at 4.

[44] AT&T Comments at 28-29.

[45] *See Federal Communications Commission Releases Data For High-Speed Services For Internet Access*, FCC Release July 23, 2002 (reporting that DSL lines increased from 2 million to 3.9 million during 2001).

[46] AT&T Comments at 27-28.

[47] *See* Roll Call, July 23, 2001 (statement of Rep. John Conyers and Chris Cannon); *see also* Comments of AT&T, *Request for Comments Deployment of Broadband Networks and Advanced Telecommunications*, Docket No. 011109273-1273-01 (National Telecommunications and Information Administration, Department of Commerce) (Dec. 19, 2001).

32, 534-36. The incumbent LECs face no similar requirements and also receive substantial subsidization for their loop plant costs.

In short, cable operators are subject to different market forces, have different incentives with regard to ISP access, operate very different networks with different operational considerations, and are subject to different regulatory regimes by statute and history. The Commission's regulatory policy must continue to take account of these differences.

III. THE COMMISSION SHOULD DECLARE THAT STATE AND LOCAL REGULATIONS THAT CONFLICT WITH THE TERMS OF TITLE VI ARE PREEMPTED.

A. Title VI Preempts The Imposition Of Multiple Franchises On A Cable Operator.

The Commission has tentatively (and correctly) concluded that Title VI does not permit LFAs to require a cable operator to secure a separate franchise to provide cable modem service.[48] The localities that contend otherwise spill much ink urging that their franchising authority springs from state and local law.[49] That is both indisputable and irrelevant. It is indisputable because the Act specifically defines the term "franchising authority" as "any governmental entity empowered by Federal, State, or local law to grant a franchise."[50] But the *source* of franchising authority in state or local law is irrelevant because Title VI preemptively limits the power that LFAs may exercise over cable operators under state and local law, and thus

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[48] *Notice* ¶ 102.

[49] Comments of the Alliance of Local Organizations Against Preemption ("ALOAP") 27-30; Comments of the City of New York ("NYC") 3-5, 15; Comments of the Mount Hood Cable Regulatory Commission et al. ("MHCRC") at 11-12; Comments of the Public Cable Television Authority et al. ("PCTA") 19-26.

[50] 47 U.S.C. § 522(10); *City of Dallas v. FCC*, 165 F.3d 341, 348 (5th Cir. 1999).

LFAs may regulate cable operators through their franchising power only as authorized by Title VI.[51]

The Act broadly defines the term "franchise" to mean "an initial authorization, or renewal thereof . . . issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction *or operation of a cable system*."[52] Section 621(a)(2) further mandates that "*[a]ny* franchise *shall be construed to authorize the construction of a cable system* over public rights-of-way, and through easements, which are within the area to be served by the cable system and which have been dedicated for compatible uses."[53] The term "cable system" is defined as "a facility . . . that is designed to provide cable service including video programming,"[54] but "is not limited to a facility that provides *only* cable service which includes video programming."[55] As Congress recognized from the initial enactment of Title VI:

> many cable systems provide a wide variety of cable services and other communications services as well. A facility would be a cable system if it were designed to include the provision of cable services (including video programming) along with communications services other than cable service.[56]

Thus, Title VI governs any franchise for the construction or operation of a cable system, regardless of what services are provided over that system, and requires that LFAs allow franchised cable operators to construct their systems over any rights-of-way in the service area

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51 H.R. Rep. No. 98-934, at 59. *See also City of Dallas*, 165 F.3d at 349 (Title VI "place[s] limits on the conditions and restrictions a local franchising authority may impose").

52 47 U.S.C. § 522(9) (emphasis added).

53 *Id.* § 541(a)(2) (emphasis added).

54 *Id.* § 522(7).

55 H.R. Rep. No. 98-934, at 44 (1984).

that are dedicated to uses compatible with the construction and operation of cable systems. No LFA has authority to impose franchises and franchise requirements regarding "the construction or operation of a cable system" outside of Title VI, regardless of what state or local law provides. Indeed, Congress declared in the Cable Act that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, *or any provision of any franchise granted by such authority*, which is inconsistent with the Act shall be deemed to be preempted and superseded."[57]

These limitations are in keeping with the declared purposes of Title VI to "establish a national policy concerning cable communications," as well as "franchise procedures and standards" and "guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems."[58] Critically, far from leaving cable information services unaddressed, Title VI was enacted to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public," and "to minimize unnecessary regulation that would impose an undue economic burden on cable systems."[59] Title VI accomplishes that goal in large measure by restricting the regulatory powers that franchising authorities (*i.e.*, governmental bodies empowered to grant a franchise for "the construction or operation of a cable system"[60]) might otherwise exercise under

(. . . continued)

[56] *Id*.

[57] 47 U.S.C. § 556(c) (emphasis added). The legislative history of this provision is also plain that any state or local franchise regulation of cable operators is governed by Title VI. H.R. Rep. No. 98-934, at 94 (1984).

[58] *Id.* § 541(a)(1)-(a)(3); *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 309 (1993).

[59] 47 U.S.C. § 541(a)(4), (a)(6).

[60] *Id.* § 522(9), (10).

state or local law. It limits the franchise fees that the LFA may charge,[61] circumscribes the power of the LFA to regulate rates,[62] forbids the LFA to "regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter,"[63] prohibits (with a narrow exception) LFAs from issuing requests for proposals for new or renewed franchises that "establish requirements for video programming and other information services,"[64] limits the ability of LFAs to enforce agreed franchise requirements for programming and services,[65] forbids LFAs to "prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology,"[66] restricts LFA authority with regard to telecommunications services and facilities,[67] imposes procedural rules for modifying franchises,[68] imposes substantive and procedural rules for renewals of the franchise (including forbidding LFAs to consider "the mix or quality of cable services or other services provided over the system" in deciding whether to renew a franchise),[69] and subjects LFA decisions to judicial review.[70] These statutory provisions (and in particular the limitations on fees and service requirements) would be eviscerated if Title VI were to be interpreted to allow LFAs, wholly

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[61] *Id.* § 542(b).

[62] *Id.* § 543(a)(1).

[63] *Id.* § 544(a).

[64] *Id.* § 544(b)(1).

[65] *Id.* § 544(b)(2)(B).

[66] *Id.* § 544(e).

[67] *Id.* § 541(b)(3).

[68] *Id.* § 545.

[69] *Id.* § 546 & (c)(1)(B).

[70] *Id.* § 555.

unfettered by federal law, to require cable operators to secure additional franchises in order to provide noncable services over the cable system.[71]

The localities seize upon language from the House Report that "H.R. 4103 maintains existing regulatory authority over all other communications offered by a cable system," and "preserves the regulatory and jurisdictional status quo with respect to noncable communications services." Such language is evidence, they contend, that Congress did not intend to interfere with LFA authority to impose franchises for specific services.[72] But that section of the legislative history is referring to the intent of Congress not to trench upon ongoing regulatory proceedings of state public service commissions concerning *intrastate* noncable communications services,[73] an intent which was codified in the express statutory clause saving such *state* authority in section 621(d)(2).[74]

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[71] In § 621(b)(3)(A), enacted as part of the Telecommunications Act of 1996, Congress made clear that no additional franchises could be required under Title VI from cable operators and their affiliates that are engaged in providing telecommunications services. 47 U.S.C. § 541(b)(3)(A). The localities argue that the express prohibition of additional franchises for the provision of telecommunications services would be redundant if Title VI generally prohibited such additional franchises to provide noncable services; *ergo*, the localities argue, they are free to impose additional franchises for information services. *See*, *e.g.*, NYC Comments at 24. This argument has no force. As the Supreme Court has emphasized, statutory language may have "clarifying value," and the best interpretation of a statue should not be avoided even when "[t]here is no question that the statute would be read as we read it even if the phrase were missing." *Gutierrez v. Ada***,** 528 U.S. 250, 258 (2000). Section 621(b)(3) sets out broadly the limitations on actions that LFAs can take against cable operators and affiliates engaged in providing telecommunications services. It was certainly reasonable for Congress to clarify in this section that these strictures could not be avoided by the ruse of purporting to require supplemental franchises for telecommunications services, and that the prohibition on additional franchises apply both to cable operators *and* their affiliates.

[72] ALOAP Comments at 29 (quoting H.R. Rep. No. 98-934, at 29).

[73] H.R. Rep. No. 98-934, at 27-29, 59-63.

[74] 47 U.S.C. § 541(d)(2); H.R. Rep. No. 98-934, at 60, 62 (stating "that *state* and Federal Authority over non-cable communications services shall be unaffected by the provisions of Title VI," and that "with respect to non-cable communications services, both the power of *any state*

(continued . . .)

Far from being intended to "preserve" LFA authority over services provided by the cable operator, the 1984 Cable Act was passed largely because of LFA overreaching in the regulation of services provided over cable systems. Although originally localities granted simple franchises to cable operators (sometimes without fee) that addressed right-of-way usage but not services, by the 1970's localities had granted "more extensive franchises" that "dealt with matters such as service requirements and rate regulation," including matters of strictly federal concern that prompted Commission preemption.[75] "[M]any modern cable franchises touch[ed] virtually every aspect[] of a cable system's operation," and Congress was concerned that "there [was] no longer a reasonable relationship between local regulation and cable systems' use of streets and rights of way."[76] Congress sought to maintain in Title VI a division of regulatory authority that "'rests on the distinction between the use of the streets and rights-of-way and the regulation of the operational aspects of cable communications,'" with the latter belonging exclusively to the Commission.[77] That is why Congress in section 624(b) forbade LFAs to "regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter,"[78] and specifically denied LFAs the power to "establish requirements for video programming or other information services."[79] The notion that Congress

(. . . continued)
public utility commission and the power of the FCC be unaffected by the provisions of Title VI") (emphasis added).

75 S. Rep. No. 98-67, at 6 (1983).

76 *Id.*

77 *Id.* at 7 (quoting *Report and Order*, 54 FCC 2d 855, 861 (1975)).

78 *Id.* § 544(a).

79 *Id.* § 544(b)(1).

intended to allow LFAs a free hand to regulate an *interstate* information service like cable modem service through franchises is flatly contrary to the text and history of Title VI.

Undaunted, the localities maintain that the Act cannot be read to preclude separate franchises for cable modem service because allegedly franchises are sometimes restricted to providing a single kind of service.[80] That is not generally true; indeed, prior to the Commission's declaratory ruling, the vast majority of LFAs interpreted the franchises they granted pursuant to Title VI to allow cable operators to provide cable modem service without additional authorizations. But the practice of individual LFAs cannot in any event affect the proper interpretation of Title VI. Because Title VI prohibits LFAs from regulating the services cable operators offer over their systems except as permitted by the Act, and specifically prohibits LFAs from "establish[ing] … requirements for … information services" in requests for proposals for new or renewed franchises in section 624(b), any attempt to impose service limitations in franchises would be unlawful and preempted under section 636 of the Act.[81] The Commission's tentative conclusion that section 624 preempts any LFA franchise regulation of cable modem service is indubitably correct.[82]

The localities contest the Commission's interpretation by arguing (with purported reliance on the legislative history) that section 624(b) only "prevent[s] the operator from 'being forced to provide specific programming.'"[83] But the localities ignore the distinction between subsections (1) and (2) of section 624(b). Subsection (b)(1) categorically forbids an LFA to

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[80] The localities offer only a single example of such a service-restricted franchise (from Ventura, California). ALOAP at 39-40.

[81] 47 U.S.C. § 544(a) & (b)(1), 556(c).

[82] *Notice* ¶ 102.

[83] ALOAP Comments at 31-32 (quoting H.R. Rep. No. 98-934, at 69).

"*establish* … requirements for … information services,"[84] whereas subsection (b)(2) grants LFAs a limited authority to "*enforce* any requirements *contained within the franchise* … for broad categories of video programming and other services."[85] The localities fail to disclose that it is only this second subsection to which the legislative history they cite refers. Indeed, as to the first subsection, the House Report is unequivocal that "[t]he cable operator may not be required, either directly or indirectly, as part of the franchise renewal or for a new franchise, to provide particular video or other information services, or even a broad category of video or other information service."[86] Subsection (b)(2) is a limited provision (not relevant to this proceeding) that allows LFA enforcement of the cable operator's voluntary, "arms-length commitments" that are "incorporated into the franchise," so long as those commitments are limited to broad categories of video programming and do not "force[]" the cable operator "to provide specific programming."[87] But the salient point is that (with a narrow express exception) Title VI categorically denies LFAs the power to *impose* service requirements on cable operators, and the localities cannot get around that restriction by the ruse of issuing separate service franchises to a cable operator that is already franchised under Title VI.[88]

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[84] 47 U.S.C. § 544(b)(1) (emphasis added).

[85] *Id.* § 544(b)(2).

[86] H.R. Rep. No. 98-934, at 68.

[87] *Id.* at 69.

[88] Section 624(b), as well as section 621(b)(3)(D), thus prohibit LFAs from imposing forced access regimes on cable operators as a matter of state and local law. *See*, *e.g.*, AT&T Comments at 32-35.

B. Title VI Preempts The Imposition Of Additional LFA Fees On Cable Modem Service.

As amended by Congress in 1996,[89] the Cable Act expressly provides that "[f]or any 12-month period, the franchise fees *paid by a cable operator with respect to any cable system* shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system *to provide cable services*."[90] Congress excluded revenues generated by non-cable services from the fee cap calculation in order to encourage cable operators to offer new and varied services over their systems. The legislative history of the amendment is explicit on this point: "This amendment makes clear that the franchise fee provision is not intended to reach revenues that a cable operator derives for providing new telecommunications services over its system, but only the operator's cable-related activities."[91]

As the localities concede,[92] LFAs have long believed that section 622 governed the fees that they could charge the cable operator for providing any service. That was undoubtedly true from 1984 to 1996, when the fee cap was based on all "gross revenues derived in such period from the operation of the cable system."[93] Likewise, after Congress in 1996 added the limitation that the revenues had to be "derived in such period from the operation of the cable system *to provide cable service*,"[94] LFAs understood that the fees that they could

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[89] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified as 47 U.S.C. § 151 *et seq*.

[90] 47 U.S.C. § 542(b) (emphasis added).

[91] Telecommunications Act of 1996, H.R. Conf. Rep. 104-458, at 64 (1996).

[92] *See* ALOAP at 44-45, NYC at 6.

[93] P.L. No. 98-549, § 622(b), 98 Stat. 2797 (1984).

[94] 47 U.S.C. § 542(b) (emphasis added); P.L. No. 104-104, Title III, § 303(b), 110 Stat 125.

charge a cable operator for all services (including cable modem service) provided over the cable system were subject to the section 622(b) cap. It is only now, after the Commission has ruled that revenues from cable modem service cannot be counted in calculating the 5% cap because it is not a cable service, that the localities strain to argue that section 622(b) does not limit their power to charge the cable operator fees for cable modem service.

First, despite the Commission's ruling, the localities contend that cable modem service should still count as a "cable service" for purposes of Section 622 because it "provide[s] an alternative means for delivery of video services and other services that fit well within the definition of cable service."[95] This argument has no merit. "Cable service" is defined as "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service," and related subscriber interaction.[96] First, the ability of a subscriber to access "streaming video" over the Internet does not qualify as "cable service" because it is not one-way transmission of video programming or other programming services selected by the cable operator to subscribers. As the Commission has held, "operator control over the selection of content offered to subscribers is a characteristic of both video programming and other programming service provided as a cable services," and "cable operators do not control the majority of information accessible by cable modem subscribers."[97] Second, the Commission has held that "streaming video" accessed by cable modem service is not consistent with the definition of "video programming" because it is not currently of television quality.[98] Third, even if these definitional hurdles could be overcome and "cable service" were a subset of "cable modem

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[95] ALOAP at 43.

[96] 47 U.S.C. § 522(6)(A).

[97] *Declaratory Ruling* ¶ 62.

service," that would not mean that statutory rules applicable only to "cable service" would apply to "cable modem service." The Commission faced a similar issue in ruling that ISPs were not eligible for leased access under section 612 of the Act; it reasoned that "Internet access services provide the consumer a broad array of services" other than "video programming," and section 612 only applied to "video programming."[99] Cable modem service is not limited to video programming or other programming services, much less to "cable service." Therefore, the statutory franchise fee cap, which is expressly limited to revenues generated from "cable services," cannot be stretched to incorporate cable modem service revenues.

The localities also now argue that the section 622(b) cap on franchise fees would not forbid service-specific fees because the term "franchise fee" is defined as "any tax, fee, or assessment of any kind imposed by a franchising authority or other government entity on a cable operator or cable subscriber, or both, solely because of their status as such."[100] According to the localities, a fee based on specific services would not be a "status" fee.[101] This argument is insubstantial.

First, as subsection 622(g)(2) makes clear, that language was meant to differentiate franchise fees specific to cable operators from taxes of general applicability, taxes on classes of which cable operators are a part, and certain special assessments (such as certain fees related to public, educational, and government access).[102] Second, under the localities'

(. . . continued)
[98] *Id.* n.236.

[99] *Internet Ventures, Inc.*, 15 FCC Rcd. 3247 ¶¶ 13-14 (2000).

[100] 47 U.S.C. § 542(g)(1) (emphasis added).

[101] ALOAP at 46-47; PCTA at 30.

[102] 47 U.S.C. § 542(g)(2).

interpretation, from the inception of the Cable Act, LFAs would have had the liberty to impose a franchise fee based on 5% of cable service revenues, and then on top of that could charge, without limit, service-specific fees imposed only on cable operators. In effect, the limitation imposed in section 622(b) would not be a limitation at all, and a statute should not be interpreted to have such absurd results.[103] Thus, a tax or fee that falls only on cable operators is clearly a tax imposed on cable operators "solely because of their status as such." The franchise fee is the LFA's "compensation" for use of the right of way to build a cable system that will be used to provide services, and no additional fees may be exacted for specific services.[104]

Next, the localities complain that the Commission's interpretation of section 622(b) leaves them uncompensated for use of the public rights-of-way for cable modem service, and contend that this interpretation of section 622(b) raises serious constitutional questions under the Fifth Amendment as a taking of property and the Tenth Amendment as an incursion on fundamental attributes of state sovereignty. It does nothing of the kind.

First, even if *arguendo* the localities' false premise were accepted that they are constitutionally entitled to compensation for each service a cable operator provides over its system, section 622(b) does not deny them compensation for cable modem service or any other noncable service. It simply fixes a fee cap that is *measured* by cable service revenues.

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[103] *See, e.g., United States v. Turkette*, 452 U.S. 576, 580 (1981).

[104] The error of the localities' interpretation is underscored by section 622(h). That statute limits any "tax, fee, or other assessment of any kind on any person (other than a cable operator) with respect to cable service or other communications service provided by such person over a cable system for which charges are assessed to subscribers but not received by the cable operator" to "5 percent of such person's gross revenues derived in such period from the provision of such service over the cable system." 47 U.S.C. § 542(h)(1), (2). This provision makes clear that the statutory fee caps apply to all services provided over the cable system. H.R. Rep. No. 98-034, at 65.

Second, the claim that localities are denied compensation for the use of municipal property in violation of the Fifth Amendment is fallacious. The use of public property in this case is the installation of the network in the public rights-of-way, not each transmission of electrons over the network. The maximum franchise fee under section 622(b) fully compensates the locality for the use of the ROW, and the localities make no showing that the total fees received are not just compensation under the Fifth Amendment.[105]

Third, there is no incursion on the fundamental attributes of state sovereignty protected by the Tenth Amendment, because Congress has unquestioned authority under the Commerce Clause to protect interstate commerce from excessive municipal fee exactions for right-of-way access. Indeed, the Supreme Court has long interceded even under the Dormant Commerce Clause to limit the permissible fees that localities can charge for use of their rights-of-way or other municipal property. Those cases establish that a municipality is only entitled to compensation for public inconvenience and "for the special cost of supervising and regulating the poles, wires and other fixtures and of issuing the necessary permits,"[106] so long as "the charge made is reasonably proportionate to the service to be rendered and the liabilities involved."[107] The Supreme Court has long rejected the contention that gross-revenues fees are reasonable compensation for use of the ROW.[108] There is no legal basis (and no factual

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[105] A utility is not entitled to just compensation for each service it provides so long as overall rates are not confiscatory. *B&O Railroad* v. *United States*, 345 U.S. 146, 150 (1953); *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 310-12 (1989). *A fortiori* a municipality cannot claim a constitutional right to "just compensation" for every service a cable operator provides over a cable system already established in the public ROW. Moreover, any takings claim would have to be assessed on an individualized basis. *Verizon* v. *FCC*, 122 S.Ct. 1646, 1679 (2002).

[106] *Mackay Tel. & Cable Co. v. City of Little Rock*, 250 U.S. 94, 99 (1919).

[107] *Postal Tel.-Cable Co.* v. *City of Richmond*, 249 U.S. 252, 259 (1919).

[108] *Western Union Tel. Co.* v. *Borough of New Hope*, 187 U.S. 419, 426 (1903).

foundation) for the localities' claim that fees subject to the section 622(b) cap are constitutionally inadequate.

The localities contend that cable modem service places additional burdens on the ROW for which they are not directly compensated. As an initial matter, this complaint (even if true) would have to be made to Congress. It is irrelevant to the interpretation of 622(b), which as a matter of plain language caps franchise fees at 5% of cable service revenues *regardless* of what burdens may be associated with other services. Moreover, as noted above, the localities' arguments about service-specific burdens on the public rights-of-way are irrelevant to the constitutional analysis because the justness of compensation is determined by the entirety of the fees the locality receives for the cable operator's use of the right-of-way.

In any event, the localities' claims are wrong. The "burdens" they identify all stem from the billions of dollars cable operators have invested in network upgrades that have a multitude of purposes beyond the capability of providing cable modem service.[109] These network upgrades – which increase bandwidth by replacing traditional tree-and-branch coaxial network architecture with a more efficient hybrid fiber-coaxial ("HFC") architecture – enhance system reliability, expand channel capacity, and enable operators to more reliably provide a variety of two-way services (including video-on-demand ("VOD"), near-video-on-demand

[109] *Eighth Annual Video Programming Report* ¶¶ 32-33 (noting that 2000 cable industry capital expenditures increased 46% from 1999 to $15.5 billion, $4.4 billion of which were upgrades); *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 16 FCC Rcd. 6005 ¶ 33 (2002) (*Seventh Annual Video Programming Report*) (noting in 2001 that "cable operators have invested nearly $36 billion in upgrades since enactment of the 1996 Act").

("NVOD"), interactive television (iTV), telephony, and cable modem services).[110] It is simply fallacious to attribute the consequences of these upgrades to cable modem service.

As the Commission has recognized, these upgrades are a part of a broad market shift in which many cable operators are expanding service offerings in the face of competitive pressures and opportunities to "add[] the value of 'one-stop shopping' for the consumer" and to "lower an operator's financial risk" from significant network investments.[111] Indeed, the network upgrades are a competitive necessity for cable operators to withstand increasing competition in the video programming market from DBS, wireless cable, broadcasting, overbuilder, and other rivals.[112] Finally, it is ironic that the localities complain that their Title

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[110] *Eighth Annual Video Programming Report* ¶ 13 (cable network investment has resulted in "increases in channel capacity, the deployment of digital transmissions, and non-video services such as Internet access," as well as some (largely experimental) telephony offerings); *Seventh Annual Video Programming Report* ¶¶ 40 & 41-59 ("Cable operators continue to upgrade their networks at a rapid pace in order to add new service offerings," including digital video services (such as video-on-demand, near-video-on-demand, and personal video recorder services), Internet access services, and telephony); *see also*, *e.g.,* Cox Communications Phoenix Upgrade Page, at <<http://www.cox.com/phoenix/upgrade.asp>> (visited July 3, 2002) (purpose of HFC upgrade is "improved picture quality, service reliability and expanded channel capacity," and to "open[] the door to other Cox products and services such as Cox Digital Cable, Cox Digital Telephone and Cox High Speed Internet Service."); Brian Dietz, *Cable: It's Not Just For T.V. Anymore*, Outside Plant Magazine (Jul. 2000), available at <<http://www.ospmag.com/features/2000/renamed_2000/0700_cable.htm>> (noting that after completion of its upgrade, MediaOne would be able to offer its customers "[a]n expanded basic cable TV channel line-up, plus more premium and Pay Per View channels"; "high-speed Internet service"; "[l]ocal telephone service with digital-quality sound"; "[d]igital cable TV featuring hundreds of channels, tiered programming packages and digital-quality sound"; "[t]he ability to deliver future interactive services such as Video on Demand"; and "[r]eliability").

[111] *Seventh Annual Video Programming Report* ¶ 59.

[112] An increasing share (now over 22%) of multichannel videoprogramming subscribers now receive their programming from noncable providers. *Eighth Annual Videoprogramming Report* ¶ 5. Moreover, the principal competitive platform to cable, DBS, increased its subscriber base by 19% from 2000 to 2001 (10 times the rate of cable subscriber growth), and now has total market share in excess of 18%. *Id.* ¶¶ 13, 57. Developing digital offerings and increasing channel capacity through network upgrades are two of cable's competitive imperatives in the video programming market, given that DBS providers frequently trumpet the greater number of

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VI franchise fees do not adequately compensate them for additional burdens on the rights of way when these upgrades are frequently *required* by the Title VI franchise agreement, as the localities acknowledge,[113] or by social contract with the Commission.[114]

The invalidity of the localities' claims is evident upon consideration of the nature of the network upgrades. A cable system with a traditional "tree and branch" architecture needs significant "active" componentry to amplify a signal as it travels through from the headend to the subscriber's premises. Amplification degrades signals and causes noise and distortions, thus placing significant limitations on the bandwidth that could be carried over the system.[115] Cable systems with this traditional architecture *are* technologically capable of providing cable modem service. Technicians need only activate a return path for two-way service using hardware that can be readily installed (without additional burdens on the public ROW) in the amplifiers already present in most cable networks.[116]

Cable operators that upgrade their networks commonly employ an HFC architecture which allows for far greater bandwidth, reliability, and signal quality. HFC architecture takes fiber optic cable "deeper" into the cable network: *i.e.*, not only trunk lines but

(. . . continued)
channels and the digital signal quality provided by their service. *See*, *e.g.*, DIRECTV FAQs ("The DIRECTV® service features more than 225 available channels of entertainment."), available at <<http://www.directv.com/DTVAPP/learn/FAQ_DTVProgramming.jsp>>; Vogel Communications, Inc., *SmallDish FAQs*, *available at* <<http://www.directmagazine.com/dirfaqs.htm>>. Subscriber retention and growth is one of the leading reasons that AT&T Broadband invests in network upgrades. Churn is almost 20 percent higher and new connections are 5 percent lower among single-family dwellings in non-upgraded areas.

[113] *See* ALOAP at 14-15; MHCRC at 3-4, 8-9; PCTA at 14-15.

[114] *Eighth Annual Video Programming Report* ¶ 33.

[115] Exh. A, Declaration of Gary Donaldson, ¶ 3 ("Donaldson Declaration").

[116] *Id.* ¶ 7.

feeder cables. Optical signals can travel farther over fiber than electrical signals can over coaxial wires before needing amplification. Thus, HFC is a more "passive" architecture that requires less active componentry (such as amplifiers) in the ROW, which in turn increases reliability, improves signal quality, and reduces noise and distortion.[117] Moreover, the HFC design effectively transforms a single cable system into a more "granular" network of smaller subsystems, with individual serving areas of 500-1,000 homes (and sometimes fewer).[118] These smaller subsystems of "network nodes" are not only more reliable – a malfunction at one will not impair the others – but they enable the increased channel capacity and improved signal quality that is vital to cable competition with rivals.[119]

All of the right-of-way burdens that the ALOAP affiants (and supporting localities) impute to cable modem service – overlashing of fiber; trenching or directional boring to lay fiber underground; utility service disruptions, road closures, traffic delays, and restorations from construction; coaxial fiber replacement; redundant routes; microwave link replacement; additional power supplies and node pedestals; larger equipment boxes[120] – are in fact consequences of general HFC network upgrades.[121] Indeed, an AT&T Broadband network upgrade will commonly increase channel capacity from 80 to 130 channels; typically, 2 of the added channels might be used for cable modem service, 2 for telephony, and the other 46 for

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[117] *Id.* ¶ 4.

[118] *Id.* ¶ 7.

[119] *Id.* ¶ 7.

[120] *See* ALOAP App. Exh. G (Andrew Afflerbach & David Randolph, Columbia Telecommunications Corporation ("CTC"), *The Impact of Cable Modem Service on the Public ROW* 2-19 (June 2002)) ("*CTC Report*").

[121] Donaldson Declaration ¶¶ 7-8. Those burdens are also exaggerated in some respects. *Id.* ¶ 11.

video programming and services.[122] Moreover, activation of return paths is necessary for all two-way services, and the equipment necessary for such activation – modules installed within the amplifier housing – creates no additional burden on the ROW.[123]

The municipalities' engineering consultants do not appear to contest that, considering video services alone, it is efficient for cable operators to build HFC networks.[124] They claim, however, that the capability to provide advanced two-way services is the reason that cable operators segment their network into smaller nodes of less than 1,000 homes (*i.e.*, to build a more granular network), and that any additional burdens associated with driving fiber deeper into the network are attributable to cable modem service.[125]

There is no merit to this argument for two reasons. First, it is simply untrue that greater segmentation is driven by the desire to build capability for advanced two-way services. HFC architectures are more operationally efficient than older tree-and-branch architecture because they reduce active components, power loading, and repair costs, and improve signal quality and subscriber experience. As the attached declaration shows, an upgrade to a granular HFC architecture of node sizes less than 1,000 homes generally would be cost-justified regardless of the impact of advanced services.[126] Moreover, improving signal quality is one of the key strategies in cable's competition with DBS.[127] Second, issues of future congestion in upstream channels are not driven solely by cable modem service, but by the entire range of two-

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[122] *Id.* ¶ 6.

[123] *Id.* ¶¶ 7, 13.D.

[124] *Id.* ¶ 8; *see* CTC Report at 2, 20.

[125] Donaldson Declaration ¶ 8; CTC Report at 2.

[126] Donaldson Declaration ¶ 9.

[127] *Id.* ¶ 7.

way services (including advanced two-way video services like VOD and NVOD, which consume more downstream bandwidth than cable modem service).[128] There is simply no basis for claiming that a granular HFC network is attributable to cable modem service.[129]

Moreover, there is no basis for the localities' claim that they will not be compensated for the burdens occasioned by network upgrades. The robust increase in cable service revenues (and thus franchise fees) from the increases in cable subscribership, channels, premium and pay-per-view offerings, and interactive cable services has swelled municipal coffers in recent years,[130] and those revenues will only increase with the improved product offerings. The Commission should ignore the legally irrelevant and factually erroneous claims that localities will be denied compensation for right-of-way burdens associated with network upgrades.[131]

C. LFAs and Cable Operators Cannot "Contract Around" Title VI.

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[128] *Id.* ¶ 10.

[129] *Id.* ¶¶ 7-10. Moreover, many of the claimed "burdens" bear no relation at all to cable modem service. For example, cable modem service does not affect the power loading of the network; any need for additional power supplies is largely attributable to telephony services. *Id.* ¶ 11.D-E. Finally, the localities ignore the countervailing reduction in burdens on municipalities that often result from network upgrades – such as the replacement of rusted street furniture with new equipment, the reduction of customer-service complaints to LFAs, and the reduction in repair burdens on the ROW from improved network reliability. *Id.* ¶ 12.

[130] *Eighth Annual Video Programming Report* Table B-4 (showing revenue growth by segment from 1997 to 2001).

[131] There is no force to the City of New York's claim that it is uncertain whether upgraded networks still qualify as "cable systems" run by "cable operators." NYC at 33-35. The definition of "cable system" does not depend on whether cable services or noncable services are the principal services for which the network is designed, as the City argues; so long as the system is designed to provide cable service to multiple subscribers, and is not within any of the statutory exceptions, it is a "cable system" under section 602(7) of the Act. 47 U.S.C. § 522(7). In any event, most network capacity on upgraded networks is used to provide cable services.

The City of New York proposes that the Commission allow local franchising authorities and cable operators to contract around Title VI's definition of cable services and agree to treat "cable services" as inclusive of cable modem service, presumably to ensure that the City and other municipalities continue to collect 5% of revenues from cable modem service.[132] The Act does not permit such maneuvers. Section 636 specifically provides that "any provision of any franchise granted by such [franchising] authority, which is inconsistent with [the Act] shall be deemed to be preempted and superseded."[133] Section 636 recognizes the substantial leverage that localities have over cable operators, and that "voluntary" contracts would not be in the public interest. That concern is particularly evident with regard to franchise fees, because any increased fees would be borne by consumers in pass-through charges pursuant to section 622.

D. The Commission Should Exercise Its Title I Authority To Preempt Any State And Local Laws Which Impose Forced Access Requirements Or Franchise Fees On Cable Modem Service, Even If Such Requirements And Fees Are Not Directly Preempted By Title VI.

Even if Title VI did not directly preempt state and local regulation of access to cable modem service and the imposition of separate fees on that service, the Commission should do so pursuant to its Title I authority.[134] Aside from the statutory and constitutional arguments refuted above, the localities argue that Title I preemption would be bad policy because cable modem service has flourished even when localities were imposing 5% franchise fees on cable modem service.

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[132] NYC at 36-37.

[133] 47 U.S.C. § 556(c) (emphasis added).

[134] AT&T Comments at 43-46.

That is bad logic. Cable modem service flourished in spite of local franchise fees, not because of them. The elimination of franchise fees on cable modem service reduces costs of the service and will spur demand. Moreover, AT&T does not argue that LFAs may not seek franchise agreements that require network upgrades (the principal examples of LFA "facilitation" of cable modem service deployment touted by the localities).[135] Section 624(b) permits LFAs "to establish requirements for facilities and equipment" in franchise renewal proposals – although that same provision expressly prohibits them from requiring cable operators to provide particular information services.[136] The Commission is rightly troubled by the prospect of a patchwork of inconsistent local regulations of cable modem service,[137] and preemption of such regulation raises no legitimate policy concerns.

The Commission should also declare preempted any cable-specific customer service requirements for cable modem service. First, as AT&T argued in its initial comments, Title VI directly forbids LFAs to regulate the rates, terms, and speed of cable modem service in the guise of "customer service."[138] Such requirements would constitute the establishment of

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[135] ALOAP at 14-15; MHCRC at 3-4, 8-9; PCTA at 14-15.

[136] 47 U.S.C. § 544(b)(1). LFAs may exercise that power to require upgrades throughout the service area to forestall "redlining" of certain neighborhoods. In any event, the localities' irresponsible claims (ALOAP at 15) that AT&T has engaged in redlining in Los Angeles and Broward County, Florida are absolutely baseless. The Commission has already rejected the claim regarding Los Angeles redlining as factually unsupported. *Applications for Consent to the Transfer of Control of Licenses and 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd. 9816 ¶¶ 148-51. The claim of redlining in Broward County likewise cannot withstand scrutiny. *See* Exh. B (Letter from Ellen Filipiak, AT&T Broadband, to K. Nicole Fontnyne-Mack, CIO, Office of Information Technology, Broward County (June 4, 2002) (documenting evidence refuting allegations)).

[137] *Notice* ¶ 97.

[138] AT&T Comments at 43.

service requirements prohibited by section 624(b)(2),[139] whereas an LFA's customer service authority under section 632 only encompasses "the direct business relation between a cable operator and a subscriber."[140] Title VI does not affirmatively grant state and local entities authority to impose customer service requirements on cable modem service. Section 632 is permissive only – it simply provides "that [a] franchising authority *may* establish and enforce … customer service requirements" under its organic authority under state and local law, and that nothing *in the statute itself* preempts any franchise agreement or state or local law that exceeds the standards promulgated by the Commission.[141] But section 632 is not a grant of power. The Commission remains free to exercise its Title I authority to preempt the imposition or enforcement of customer service standards on cable modem service and, as shown below, there are compelling reasons for it to do so.[142]

Congress has directly empowered the Commission to use deregulatory measures to promote the development of advanced telecommunications capability in section 706 of the Act, and it is clear that customer service regulation that varies from town to town would wreak havoc with the deployment of cable modem service, especially given that competing Internet access technologies, such as DSL, would not face a similar patchwork quilt of regulations. Additionally, the enforcement of standards designed for cable service are frequently inappropriate for cable modem service. For example, much more telephone time is frequently required for customers experiencing problems with cable modem service than for video services. Finally, local regulation of customer service would be problematic, if not unworkable, in light of

[139] 47 U.S.C. § 544(b)(2).

[140] H.R. Rep. No. 98-934, at 79.

[141] 47 U.S.C. § 552(a)(1), (d) (emphasis added).

multiple ISP access to cable systems. LFAs have no authority to regulate pure ISPs such as Earthlink, and thus LFAs would only be able to regulate cable modem service that is provided through an entity affiliated with a cable operator. The Commission cannot tolerate an unworkable balkanization of the Internet where cable operator ISPs are subject to different and more stringent customer service regulation than other ISPs – including ISPs providing service over the same facilities. Further, preemption of local regulation of cable modem service would in no way sacrifice the interests of consumers. As in any other competitive business, cable operators who provide poor customer service will lose business. The Commission may rely on market forces, buttressed by state and federal consumer protection laws of general applicability, to protect cable modem service subscribers.

E. The Commission Should Preempt Any State And Local Laws Inconsistent With Cable Operators' Federal Statutory Right To Use Subscriber Information To Conduct Legitimate Business Activities Related To Cable Modem Services.

Section 631 of the Communications Act of 1934, as amended, addresses the protection of subscriber privacy in the provision of cable or other services.[143] Congress expressly granted to cable operators the right, without subscriber consent, to use the cable system to collect such personally identifiable information as is necessary to provide a cable service or other service,[144] and to disclose such information when necessary to render or conduct a

(. . . continued)
142 *See e.g.*, Comcast Comments at 32-33.

143 *See* 47 U.S.C. § 551.

144 *See id.* § 551(b)(2).

legitimate business activity related to a cable or other service provided by the cable operator to the subscriber.[145]

The Electronic Privacy Information Center incorrectly contends that "[d]ata marketing based on subscriber information violates the spirit and intent of federal cable communications policy."[146] To the contrary, the marketing of additional services to existing subscribers is a "legitimate business activity" within the protection of the Act. Section 631 represents a crucial Congressional determination of the appropriate balance between the privacy rights of consumers and the First Amendment rights of cable operators to use personally identifiable information for legitimate business purposes.[147] As the House Report accompanying the 1984 Act states, "[s]ection 631 creates a nationwide standard for the privacy protection of cable subscribers. It creates a system of fair information practices, *while at the same time not unduly restricting appropriate use and disclosure by the cable operator*."[148]

The Commission should preempt inconsistent state and local privacy legislation that does not respect the First Amendment rights of cable operators to the same extent that Congress has. That the Commission has such preemption authority is clear from sections 624, which prohibits regulation of information services, and 631(g), which provides that "[n]othing in this title shall be construed to prohibit any State or any franchising authority from enacting or

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[145] *See id.* § 551(c)(2).

[146] Comments of the Electronic Privacy Information Center at 3.

[147] *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999) (vacating stringent "opt-in" regulations restricting the ability of carriers to use customer proprietary network information (CPNI) to market additional products and services to their customers as violating the First Amendment), *cert. denied*, 530 U.S. 1213 (2000); *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

[148] *See* H.R. Rep. No. 98-934 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4713 (emphasis added).

enforcing laws *consistent with this section* for the protection of subscriber privacy."[149] A state or local ordinance that expressly prohibits conduct directly authorized by the federal statute is inconsistent with the federal statute and should be preempted.

The Commission should take action against any state or local regulation that threatens national uniformity in privacy policy for cable modem services.[150] Additionally, consumers do not distinguish – nor should they reasonably be expected to distinguish – between cable modem service and other Internet services on privacy grounds. Privacy regimes for related media should not diverge and the Commission should ensure that localities do not subject Internet users and cable modem services to disparate privacy regimes. Moreover, targeted marketing is beneficial to consumers, and preemption of local regulation that interferes with that activity furthers the Act's goals of promoting "efficient" communications services and "minimiz[ing] unnecessary regulation that would impose an undue economic burden on cable systems."[151] Furthermore, draconian privacy ordinances preclude legitimate business activity. The Commission has rejected such a hamfisted approach in other contexts, refusing to adopt a rule allowing customers to restrict a carrier's use of CPNI for *all* marketing purposes. To do so, the Commission held, "would do little to further the goal of protecting consumers' privacy."[152] Congress created a strong, reasonable, and balanced regime for protecting consumer privacy in section 631, and the Commission should preempt any state and local regulation that is inconsistent with the federal policy.

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[149] 47 U.S.C. § 551(g)(emphasis added). *See also* AT&T Comments at 40-41

[150] *See* H.R. Rep. No. 98-934, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667 ("A national policy is needed because… privacy issues raise a number of Federal concerns").

[151] 47 U.S.C. § 151, 601(6).

IV. THE COMMISSION SHOULD DECLARE THAT CABLE OPERATORS DID NOT ACT UNLAWFULLY IN PASSING ON TO SUBSCRIBERS FRANCHISE FEES THAT WERE ACTUALLY ASSESSED AND PAID.

The Commission should exercise its authority under Section 622 of the Act to resolve disputes over whether cable operators charged unlawful rates in passing through franchise fees for cable Internet access services on the good-faith assumption that such services were "cable services" on which franchise fees were paid.[153] A federal district court has now correctly ruled that Congress did not create a private right of action under section 622 to seek refunds of franchise fees above the statutory cap that were passed through in subscriber rates.[154] Nonetheless, to eliminate any uncertainty and to forestall fruitless appeals and the filing of similar actions in different courts, the Commission should exercise its jurisdiction to clarify that subscriber charges for franchise fees on cable modem service that were actually assessed by, and paid to, LFAs did not violate the Act.

The *Bova* plaintiffs, unsuccessful in their district court litigation, filed comments in this proceeding challenging the Commission's jurisdiction to resolve this dispute. First, they claim that section 622(d) of the Act contemplates that fee disputes would be resolved by judicial action. However, as the *Bova* court ruled, the "court action" referenced in section 622(d) refers to actions between LFAs and cable operators.[155] Section 622(c) authorizes the cable operator to itemize separately from the rates for service any charges reflecting franchise fees, PEG channel costs, or other governmental fees, taxes, assessments or charges on the transaction between the

(. . . continued)

[152] *See Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, FCC 02-214, ¶ 88 (released July 25, 2002).

[153] AT&T Comments at 47-52.

[154] *Bova* v. *Cox Communications, Inc.*, 2002 WL 1575738 (W.D. Va. July 10, 2002).

operator and the subscriber.[156] Section 622(d) in turn provides that "[i]n any court action under subsection (c) the *franchising authority* shall demonstrate that the rate structure reflects all costs of the franchise fees"[157]; it thus contemplates that franchising authorities may bring court actions to prevent cable operators from imposing separate line item charges under subsection (c) for any costs that are already reflected in rates. Thus, the Act expressly contemplates only court actions between cable operators and LFAs, and, as the *Bova* court correctly ruled, there is no basis for implying a private right of action for damages on behalf of subscribers.[158]

Regardless of what court actions are authorized under section 622, any such authorization would not exclude or limit the Commission's jurisdiction. The *Bova* plaintiffs argue that the 1984 Cable Act reflected an intent to limit the Commission's jurisdiction over franchise fees, but, as expressly declared in section 622(i), Congress only sought to forbid the Commission "to regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, *except as provided in this section*."[159] In other words, the Commission is entitled to regulate franchise fees "as provided in this section": *i.e.*, to enforce the other franchise-fee requirements of section 622 (including the 5% cap of section 622(b)).

(. . . continued)
155 *Id.* at *3.

156 47 U.S.C. § 542(c).

157 *Id.* § 522(d).

158 *Bova*, 2002 WL 1575738 at *1-4.

159 47 U.S.C. §§ 542(i) (emphasis added).

Congress simply was prohibiting the Commission from limiting the right of LFAs to charge fees within the cap.[160] As the D.C. Circuit has squarely held, even though

> the franchise fee provision does not contain an explicit delegation of regulatory authority . . . [b]ecause the provision establishes a *uniform federal standard* for franchise fees, and because the provision has been incorporated into the Communications Act, it is clear . . . that the *ultimate* responsibility for ensuring a 'national policy' with respect to franchise fees lies with the federal agency responsible for administering the Communications Act.[161]

Undoubtedly, the question whether a cable operator violates section 622 by passing through franchise fees on cable modem service that were actually imposed by, and paid to, an LFA "potentially affects cable operators nationwide," and is thus the kind of dispute over which the Commission can and should exercise jurisdiction.[162]

The Commission should put an end to these disputes by properly ruling that cable operators have no liability for refunds so long as they did not bill subscribers for franchise fees not actually paid to the franchising authority. There is no authority in the statute for the *Bova* plaintiffs' position that the cable operator must make a prior determination of the lawfulness of the franchise fees that are assessed, and limit their subscriber rates accordingly even before the legality of the fee is determined. Indeed, to expect a cable operator to do so would place it in the terrible dilemma of risking either an LFA ruling that it had violated its franchise by refusing to pay all franchise fees owed or lawsuits by subscribers alleging that they were overcharged. To the contrary, as the Commission has stated, the statute "permits a cable operator to pass through,

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[160] H.R. Rep. No. 98-934, at 65 (1984) (noting that "current FCC regulations which restrict the use of revenues to cable-related uses and permit franchise fees of 5 percent only if a waiver is granted by the FCC are invalid by the terms of this legislation").

[161] *ACLU* v. *FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987) (emphases in original).

[162] *Time Warner Entertainment/Advance-Newhouse Partnership and the City of Orlando*, Mem. Op. & Order, 14 FCC Rcd. 7678, ¶ 12 (1999).

as an external cost, the total franchise fee . . . in its regulated rates."[163] Section 622 permits the cable operator to "designate that portion of a subscriber's bill attributable to the franchise fee as a separate item on the bill," and to identify as a line item "[t]he amount of the total bill *assessed as a franchise fee* and the identity of the franchising authority to which the fee *is paid*."[164] If a cable operator has billed the subscriber only for franchise fees it actually paid on the good faith (even if mistaken) assumption that such fees were permissible under section 622, the operator has not violated the Act because it has simply passed through an external cost, as the Act permits. In turn, if the operator's franchise fee costs are reduced (for example, if an LFA decreases franchise fee assessments to account for past charges in excess of the statutory cap), the operator must pass through those decreases to the subscriber.[165] Any other outcome would be unjust because the operator does not profit from the franchise-fee passthroughs, and should not face potentially significant liability for any unlawful actions by the LFA in assessing fees.[166]

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[163] *City of Pasadena*, 16 FCC Rcd. 18,192 ¶ 23 (Oct. 4, 2001) (emphasis added).

[164] 47 U.S.C. § 542(c)(1), (f) (emphasis added).

[165] 47 U.S.C. § 542(e).

[166] In the alternative, the Commission may exercise its jurisdiction to limit its statutory classification of cable modem service as a "cable service" to prospective effect. *See* AT&T Comments at 50-52. But if for any reason the Commission were to allow cable operators refunds of franchise fee charges in excess of the 5% cap to subscribers, it should limit liability to a one-year period and authorize operators to credit any such refunds against future franchise payments to LFAs. Such principles are reflected in the analogous regulations of the Commission that govern regulated rate refunds. *See* 47 C.F.R. § 76.942(c)(2), (f).

The Commission should reject the localities' suggestion that it order refunds to subscribers, but leave the issue of franchise fee recovery from LFAs to state law. The localities urge this approach, claiming that under the state common law of payments that cable operators would not be legally entitled to refunds. *See* ALOAP Comments at 64-65. State law is more mixed than the localities suggest, *see Payment of Taxes to Prevent Closing of, or Interference with, Business as Involuntary so as to Permit Recovery*, 80 A.L.R.2d 1040, 1042-43, and in many circumstances the cable operator may be able to prove that the franchise fee payments were involuntary and thus recoverable. 17 E. McQuillin, *The Law of Municipal Corporations* § 49.63; *Beachlawn Bldg. Corp.* v. *City of St. Clair Shores*, 121 N.W.2d 427 (Mich. 1963). But

(continued . . .)

V. THE COMMISSION LACKS AUTHORITY TO APPLY THE REQUIREMENTS OF THE COMMUNICATIONS ASSISTANCE FOR LAW ENFORCEMENT ACT TO CABLE MODEM SERVICE.

The Department of Justice ("DOJ") and the FBI urge the Commission to conclude that notwithstanding its classification as an information service, and not a telecommunications service, cable modem service is subject to the assistance capability requirements of the Communications Assistance for Law Enforcement Act ("CALEA").[167] According to DOJ and the FBI, applying the requirements of CALEA to cable modem service is necessary to preserve the surveillance abilities of the federal government. Neither the statutory text nor the legislative history of CALEA supports the government's position.

CALEA requires a telecommunications "common carrier," 47 U.S.C. § 1001(8)(A), to ensure that its equipment and facilities and services are capable of isolating and enabling interception of call identification and other information, *id.* § 1002(a). These assistance capability requirements expressly do *not* apply to "persons or entities insofar as they are engaged in providing information services."[168] Interpreting this provision, the Commission has concluded that CALEA excludes from coverage "*all* information services, such as Internet service providers or services such as Prodigy and America-On-Line."[169]

(. . . continued)
there is no reason for the Commission to leave this federal matter to the vagaries of state law. Moreover, any risk that cable operators would not have legal recourse under state law simply underscores the need for a just national solution that makes cable operators whole for any refunds, since they did not profit from any excessive franchise fee charges.

[167] *See* Comment of the Department of Justice and the Federal Bureau of Investigation.

[168] 47 U.S.C. § 1001(8)(C).

[169] *See Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd. 7105, 7111, ¶ 12 (1999) (emphasis added) ("*CALEA Second Report and Order*"); *see also United States Telecom Ass'n* v. *FCC*, 227 F.3d 450, 455 (D.C. Cir. 2000) ("CALEA does not cover 'information services' such as e-mail and internet access").

In contending that cable modem service is subject to the requirements of CALEA despite its classification as an interstate information service, DOJ and the FBI note the Commission's prior statement that CALEA applies to "cable operators and electric and other utilities to the extent they offer telecommunications services for hire to the public."[170] But the Commission's recognition that CALEA assistance requirements apply to cable operators' provision of telecommunications services does not (and could not) qualify the statutory command that those requirements do not apply to the provision of information services. DOJ and the FBI point out that cable modem services are provided via telecommunications and argue that this "joint" telecommunications/information service use triggers CALEA assistance requirements, but as the Commission concluded in its Declaratory Ruling, cable modem service is solely an "interstate information service," and "there is *no separate telecommunications service* offering to subscribers or ISPs."[171] *See also CALEA Second Order and Report* ¶ 27 ("the mere use of transmission facilities [does] not make [an] offering subject to CALEA as a telecommunications service").

Even though cable modem service is not subject to CALEA assistance requirements, the government is still authorized to conduct surveillance on such services. As the Commission has explained, "[a]ll of these . . . information services can be wiretapped pursuant to court order, and their owners must cooperate when presented with a wiretap order."[172]

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[170] *CALEA Second Report and Order* ¶ 17.

[171] *Declaratory Ruling* ¶ 33 (emphasis added).

[172] *CALEA Second Report and Order* ¶ 12.

Exemption from CALEA only means that "these services and systems do not have to be designed so as to comply with [CALEA's] capability requirements."[173]

VI. THE COMMISSION LACKS AUTHORITY TO IMPOSE THE REQUIREMENTS OF SECTION 255 ON CABLE MODEM SERVICE.

Because cable modem service has been classified as an information service and not a telecommunications service, it is not subject to the requirements of § 255 of the Act, which requires that telecommunications services and products be made accessible to people with disabilities, if readily achievable. Nonetheless, two commenters urge the Commission to exercise its ancillary jurisdiction under Title I to apply the requirements of § 255 to cable modem service.[174] These commenters argue that unless § 255 is extended to cable modem service, people with disabilities will not be guaranteed the benefits of Internet access.

AT&T is sensitive to these concerns and is committed to meeting the needs of disabled Internet subscribers.[175] But the Commission does not have authority to extend § 255 to

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[173] *Id*. The government's authority to conduct surveillance on Internet access services is found in various federal (and state) statutes -- including Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 212 (1968) (codified, as amended, at 18 U.S.C. §§ 2510 *et seq.*), the Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-511, 92 Stat. 1783 (1978) (codified, as amended, at 50 U.S.C. §§ 1801 *et seq.* and 1841 *et seq.*) and the Electronic Communications Privacy Act of 1986, Pub. L. 99-508, 100 Stat. 1848 (1986) (codified, as amended, at 18 U.S.C. §§ 2701 *et seq.* and 3121 *et seq.*) -- which were recently strengthened by the USA PATRIOT Act of 2001. Pub. L. 107-56, 115 Stat. 272 (2001). As the Commission correctly noted, Congress was clear to state that the USA PATRIOT Act was not intended to amend CALEA or "impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance." *Id.*, 115 Stat. at 292, § 222.

[174] *See* Rehabilitation Engineering Research Center on Telecommunications Access; Telecommunications for the Deaf, Inc.

[175] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion,* Third Notice of Inquiry, CC Docket No. 98-146, Comments of AT&T at 12 (filed September 24, 2001); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely*
(continued . . .)

cable modem service. Although the Commission has exercised its ancillary jurisdiction to extend § 255 to two information services – voice mail and interactive menu service – it did so only because it found that those two services were "integral to the use of telecommunications services today."[176] Without access to those services, the Commission concluded, "the underlying telecommunications services that Sections 255 and 251(a)(2) have sought to make available will not be accessible to persons with disabilities in a meaningful way."[177] But the Commission specifically rejected requests to extend § 255 to other information services, including email, electronic information services, and web pages.[178] These services, the Commission ruled, are not "essential" to the effective use of telecommunications services and therefore do not fall within the Commission's ancillary jurisdiction.[179]

VII. THE COMMISSION SHOULD REAFFIRM ITS TENTATIVE CONCLUSION THAT FORBEARANCE IS JUSTIFIED TO THE EXTENT CABLE MODEM SERVICE IS CLASSIFIED BY ANY COURT AS A TELECOMMUNICATIONS SERVICE.

A few commenters dispute the Commission's tentative conclusion that it should forbear from imposing Title II common carrier obligations on cable modem service to the extent

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(. . . continued)
Fashion, Second Notice of Inquiry, CC Docket No. 98-146, Comments of AT&T at 31-32 (filed March 20, 2000).

[176] *In the Matter of Implementation of Sections 255 and 251(A)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, ¶ 99 (1999) ("Section 255 Report and Order").

[177] *Id*.

[178] *Id*. ¶ 107 ("we decline to extend accessibility obligations to any other information services").

[179] *Id*. In all events, there is no basis to attempt to apply § 255 to cable modem service while exempting substantially equivalent services such as DSL and dial-up from that section's requirements. If the Commission were to conclude that it had potential grounds to apply § 255, the proper course plainly would be to consider such action in a proceeding addressing all forms of Internet access technologies.

any court rules that cable modem service is a telecommunications service. Earthlink claims that because forbearance under Section 10 applies only to telecommunications services, it would be illogical for the Commission to forbear here since the Commission has concluded that cable modem service is *not* a telecommunications service.[180] Earthlink misses the point. The Commission made clear that forbearance would only be necessary to the extent that certain *courts*, not the Commission, wrongly classify cable modem service as a telecommunications service.[181]

Earthlink and other commenters also argue that the Commission has not adequately justified its tentative conclusion to forbear under Section 10.[182] That is plainly incorrect. Forced access (or other Title II) regulation of cable modem service is not necessary to protect consumers, 47 U.S.C. § 160(a)(2), or to ensure that cable modem service providers' practices and rates are just and reasonable and not unreasonably discriminatory, *id*. § 160(a)(1), because market forces provide cable operators with strong incentives to provide consumers with quality, competitively priced services and a range of ISP options.[183] Government intervention could only dampen the pro-competitive experimentation that is currently taking place. And forbearance is fully consistent with the public interest, 47 U.S.C. § 160(a)(3). Indeed, subjecting

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[180] *See* Earthlink at 15-16.

[181] *See Declaratory Ruling* ¶ 95.

[182] Earthlink at 16; Consumer Federation at 16-20; People of the State of California and the California Public Utilities Commission at 5.

[183] AT&T at 52-53; *Third Section 706 Report* ¶ 89 (concluding that "investment in infrastructure remains strong," and that "alternative and developing technologies will continue to be made available to customers"); *Second Section 706 Report* ¶ 218 (stating that "by all major indicators . . . . [r]ivalry among providers will increase"); *First Section 706 Report* ¶ 92 (noting that "companies in virtually all segments of the communications industry are making sizeable investments in broadband technologies" and that "these investments will lead to more competition in, and greater deployment of, broadband generally").

cable modem service to different regulatory obligations in different municipalities would place a significant burden on cable operators and could leave some areas without cable modem service altogether.

CONCLUSION

For the foregoing reasons, the Commission should again decline to impose cable forced access regulation and should affirmatively preempt state and local regulation of cable modem services as described above.

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August 6, 2002

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Comments of AT&T Corp. was served, by first class mail, the 6th day of August, 2002, on the following:

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